85-1737

Case No. 86-_____

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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

1986 TERM

KEVIN J. LOVE,
PETITIONER,
vs.
SUMMIT COUNTY, a government entity,
RON R. ROBINSON, Sheriff of Summit County,
RALPH WILLIAM WALLIN, JR., Summit County
Commissioner, GERALD E. YOUNG,
Summit County Commission, and
CARL T. OVARD, Summit County
Commissioners,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a long-term pre-trial detainee's right of access to the courts, as required by Bounds v. Smith, 430 U.S. 817 (1977), satisfied when the jail merely provides the detainee access to a telephone and a telephone directory, free stationery and postage, and access to an attorney who is unwilling to represent him on the matters for which the detainee seeks access to the courts?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
DECISIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF CASE	4
STATEMENT OF FACTS	6
ARGUMENT IN SUPPORT OF GRANTING PETITION	10
The Decision of the Court of Appeals is in Conflict with the Rulings of this Court	10
A. Respondents Did Not Provide Petitioner With an Adequate Law Library or Adequate Assistance From Persons Trained In the Law	10
B. Respondents Failed to Satisfy Their Affirmative Obligations Under Bounds	10
CONCLUSION	23

APPENDIX

Decision of the United States Court of Appeals for the Tenth Circuit A-1

Order of the United States Court of Appeals for the Tenth Circuit denying Motion for Rehearing A-23

TABLE OF AUTHORITIES

CASES

Bonner v. City of Prichard,
661 F.2d 1206 (11th Cir. 1981) . . 11

Bounds v. Smith,
430 U.S. 817 (1978) 11, 12
13, 14, 16, 17, 19, 20

Cruz v. Hauck,
404 U.S. 59 (1971) 10

Delta Equipment and Construction
Co., Inc., et al. v. Royal
Indemnity Co., et al.,
186 So. 2d 454 (La. App. 1966) . . 19

Gilmore v. Lynch,
319 F. Supp. 105 (N.D. Cal.
1970), aff'd sub nom. Younger
v. Gilmore, 404 U.S. 15 (1971) . . 10, 14

Love v. Summit County, et al.,
776 F.2d 908 (10th Cir.
1985). 1, 2, 6

William v. Leeke,
584 F.2d 1336 11

Younger v. Gilmore,
404 U.S. 15 (1971) 14

CONSTITUTIONS

United States Constitution

Fourteenth Amendment 2, 3

STATUTES

United States Code

28 U.S.C. § 1254(1). 2

42 U.S.C. § 1983 . . . . . 3, 4, 9

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PETITIONER KEVIN J. LOVE, by and through his counsel of record, Brian M. Barnard of Utah Legal Clinic and Sue Vogel of Jones, Waldo, Holbrook & McDonough, submits the following BRIEF in Support of his Petition for Writ of Certiorari.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in this matter is set forth in Love v. Summit County, et al., 776 F.2d 908 (10th Cir. 1985). The decision of the United States District Court for the District of Utah, Central Division is unreported and unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit, Love v. Summit County et al., 776 F.2d 908 (10th Cir. 1985) was entered on November 8, 1985.

On December 6, 1985, petitioner filed with the Clerk of the United States Court of Appeals for the Tenth Circuit a Petition for Rehearing and a Suggestion for Rehearing En Banc, which was denied on January 22, 1986.

Jurisdiction in this Court to review the judgment of the Court of Appeals below is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Section 5 of the Fourteenth Amendment to the United States Constitution, which states:

> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Congress enforces Section 1 of the Fourteenth Amendment by Title 42, Section 1983, United States Code, which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress.

STATEMENT OF CASE

In May, 1982, petitioner filed a civil rights action pursuant to 42 U.S.C. § 1983 alleging that the failure of the Utah Summit County Jail to provide him with access to a law library or an adequate substitute while he was a long-term pre-trial detainee in the jail violated his right to due process.

On December 12, 1982, the United States District Court for the District of

Utah dismissed petitioner's complaint after hearing arguments on respondents' motion to dismiss brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The United States Court of Appeals for the Tenth Circuit affirmed that decision, finding that although petitioner was denied access to a law library, he had been provided access to alternative sources of legal assistance including access to a telephone and free postage, and had also had conversations with an attorney who represented him in a matter other than the matter for which he desired access to the courts.

The decision of the United States Court of Appeals for the Tenth Circuit was filed on November 8, 1985. On December 6, 1985, petitioner filed with the same court a Petition for Rehearing and a Suggestion

for Rehearing En Banc, which was denied on January 22, 1986.

STATEMENT OF FACTS

Petitioner, an indigent, was incarcerated in the Summit County Jail for seven months while awaiting a criminal trial. The state court appointed an attorney to represent him in the criminal trial. Kevin Love v. Summit County et al., 776 F.2d 908 (10th Cir. 1985), set forth in the Appendix to this Petition (hereinafter cited as "A. ___").)

Petitioner had substantial complaints concerning his treatment and unconstitutional confinement conditions while incarcerated, including lack of recreation and lack of medical attention. (A. 3). To pursue these claims, he sought access to a law library orally from

respondent jailers in late March or early April 1982, and in writing on April 22, 1982. Respondent jailers denied his request. (A. 4). Sheriff Robinson of Summit County jail told petitioner that the jail did not allow inmates access to a law library because the jail does not have enough staff to supervise inmates while they are in the library and because "what they [the inmates] wanted to do was turn around and sue him and sue Summit County jail staff and . . . officers . . . ." (A. 4). Other inmates requested access to a law library at the same time as petitioner and were denied such access. (A. 6).

The Summit County jail does not have a law library. (A. 5). Summit County itself has a small law library in the same building as the jail; however, the jail

has no rules permitting jail inmates to use that or any other law library. (A. 5). The jail allows inmates to contact attorneys and the courts upon request and makes a telephone and notaries public available to the inmates. (A. 6). If an inmate is indigent, the County provides free postage, envelopes and stationery to enable the inmate to communicate with the courts. Summit County does not provide free attorneys, paralegals or other persons trained in the law to indigent jail inmates who need help preparing habeas corpus petitions or civil rights claims. (A. 6).

Petitioner had no legal representation for the civil rights claims he wanted to file. (A. 7). Petitioner asked his criminal attorney about the claims, but that attorney declined to help

him. Instead, he referred petitioner to Mr. Brian M. Barnard, one of the attorneys presently representing petitioner in this case. (A. 7). Mr. Barnard likewise declined to represent him in the civil rights claim regarding other jail conditions, but did provide him pre-printed forms from the federal court clerk's office for pro se complaints under 42 U.S.C. § 1983. (A. 8). Mr. Barnard gave petitioner some "limited instructions" and encouragement on completing and filing the forms, and told petitioner that other attorneys might be available on a contingency fee basis and that he could assist petitioner in trying to find such counsel. (A. 7, 8).

Petitioner had not been prejudiced on his substantive civil rights claims when the motion to dismiss was considered as a

result of refusal by the two attorneys to represent him--at that time, petitioner still had the right to pursue those claims under the applicable statute of limitations, if he could find counsel or proceed pro se. (A. 8).

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The Decision of the Tenth Circuit is in Conflict with the Rulings of this Court.

A. Respondents Did Not Provide Petitioner With an Adequate Law Library or Adequate Assistance From Persons Trained in the Law.

In Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), aff'd sub nom. Younger v. Gilmore, 404 U.S. 15 (1971), the Court held that access to the courts is a fundamental constitutional right and that state authorities have an affirmative obligation to guarantee that right to inmates. In Cruz v. Hauck, 404 U.S. 59

(1971), the Court held the right of access to the courts to be applicable to county jail inmates as well. Other courts have held the right of access also to apply to long-term pre-trial detainees. See, e.g., Williams v. Leeke, 584 F.2d 1336, 1340 (4th Cir. 1978); Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981). In Bounds v. Smith, 430 U.S. 817 (1978), the Court articulated the standard of assistance that satisfies an inmate's constitutional right of access to the courts. It stated:

> We hold . . . that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

Id. at 828 (emphasis added).

The Court specifically stated that the right of access to the courts includes access to enable inmates to bring civil rights suits. It stated:

> [T]his court has 'constantly emphasized' [that] habeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights.

Id. at 827.

The Court provided examples of the alternatives that may be provided to inmates to satisfy their constitutional right of access to the courts. It mentioned the following possibilities:

> • The training of inmates as paralegal assistants to work under lawyers' supervision.
>
> • The use of paraprofessionals and law students, either as volunteers or in formal clinical programs.

- The organization of volunteer attorneys through bar associations or other groups.

- The hiring of lawyers on a part-time consultant basis.

- The use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services offices.

Id. at 831. The Court encouraged local experimentation but warned that any plan chosen "must be evaluated as a whole to ascertain its compliance with constitutional standards." Id. at 832.

A main point of the Bounds decision is that although governmental entities are allowed flexibility in establishing a plan to provide inmates with access to the courts, their flexibility is limited by the requirement that the access provided must be "adequate, effective, and

meaningful." Id. at 822. Bounds made it clear that the mere fact that an inmate may write a letter to a judge does not constitute meaningful access to the courts, nor does the mere fact that an inmate may be able to file a handwritten pro se complaint seeking relief. Meaningful access means that an inmate is able to present his or her claim to the court in a manner so that it can be understood and properly considered by the court.

Further explanation of what is required to satisfy inmates' right of access to the courts was provided in Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), aff'd sub nom. Younger v. Gilmore, 404 U.S. 15 (1971). In that case, one of the first major cases addressing inmates' right of access

to the courts, a three-judge district court defined access to the courts as:

> encompass[ing] all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him.

319 F. Supp. at 110.

The court went on to describe what, practically, access to the courts requires:

> [T]his Court takes notice that more than simple 'facts' are needed in order to file an adequate petition for relief by way of habeas corpus. A prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent. He should know <u>which</u> facts are legally sufficient and merit presentation to the court, and which are irrelevant or confusing. When the Return is filed, it is never without abundant citations to legal authority, and a proper traverse must take cognizance of these points. No attorney

> filing a habeas petition omits a statement of points and authorities, and neither does the State's attorney in responding to one.

Id. (emphasis in original).

A similar concern was voiced by the Court in Bounds, in which the Court stated:

> [I]f the State files a response to a pro se pleading, it will undoubtedly contain seemingly authoritative citations. Without a law library, an inmate will be unable to rebut the State's argument . . . . Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation.

Bounds, 430 U.S. at 826.

The import of Bounds and the requirement of meaningful access to the courts dictate that an inmate must be able to present his or her claims to the court such that the court will be able to

understand and consider them, and such that meritorious claims are not summarily dismissed because of poor or incomplete presentation in a non-adversary situation.

In the case before this Court, the United States Court of Appeals for the Tenth Circuit held that although petitioner was denied access to a law library, he was provided "access to alternative sources of legal assistance," including access to a telephone and free postage, and that he had had conversations with counsel who represented him on matters other than the matter for which he desired access to the courts.

The "plan" provided to petitioner by Summit County does not satisfy the requirements set forth in Bounds that the authorities "provide[e] prisoners with adequate law libraries or adequate

assistance from persons trained in the law," and that any such plan provide the inmate with meaningful access to the courts. Id. at 828.

Access to a telephone and free stamps does not constitute meaningful access to the courts or "adequate assistance from persons trained in the law." Id. Nor does access to counsel who is unwilling to assist the inmate in the matter for which he or she seeks assistance constitute meaningful access or "adequate assistance."

Well-grounded in common law is the principle that no attorney is obligated to represent his or her client in all matters when the attorney has limited the representation to a single matters, or to specific matters. This rule was articulated by a State Court of Appeals of Louisiana as follows:

> Authorization to represent a client in connection with a specific legal matter does not imply authorization to handle all others, nor does the agreement or consent of an attorney to represent a prospective client in a particular matter create an attorney-client relationship as regards other business or affairs of the client.

Delta Equipment and Construction Co., Inc., et al. v. Royal Indemnity Co., et al., 186 So. 2d 454 (La. App. 1966).

The courts below interpreted the "access to the courts" requirement in a way that directly contradicts the mandates of this Court in Bounds. The United States District Court of Appeals for the Tenth Circuit found that petitioner had "access to" an attorney who declined to help him. Access to an unwilling attorney is not the same as "access to the court." According to the Court in Bounds, "access to the courts" is to be

meaningful, and to be accomplished through "adequate law libraries or adequate assistance from persons trained in the law." Id. at 828. Bounds does not allow the constitutional requirements to be satisfied by access to persons trained in the law; instead, Bounds requires meaningful access to the courts to be provided through access to a law library or adequate assistance from persons trained in the law. Petitioner was not provided any such access.

B. Respondents Failed to Satisfy Their Affirmative Obligations Under Bounds.

In Bounds, the Court stated that inmates' right of access to the courts places upon officials an affirmative obligation to develop positive, "remedial measures to insure that inmate access to the courts is adequate, effective, and

meaningful." Bounds, 430 U.S. at 817. The Court has held that this affirmative obligation is not satisfied merely because the state refrains from interfering with legal assistance provided by "jailhouse lawyers." Rather, officials are required to affirmatively provide adequate law libraries or adequate assistance from persons trained in the law.

In the case before this Court, the lower court found that Summit County in no way impeded petitioner's contact with the courts, that it allowed him to talk to attorneys about his civil rights claims, and that it provided him with a phone, postage and stationery. Thus, the only affirmative steps taken by respondents were to provide petitioner with postage, stationery, a telephone and a directory. The remainder of what respondents did was

merely to refrain from interfering with petitioner's contact with courts and attorneys.

If this decision of the lower court is left to stand, it will remove any duty on the part of officials to take affirmative steps to to insure inmates' access to the courts is adequate, effective and meaningful, as required by this Court in Bounds. It will send a message to jailers that they no longer need to provide inmates with a law library or legally trained individuals -- that all they need to do is give an inmate postage stamps, stationery, use of a telephone and directory, and then refrain from interfering. This is clearly not the message sent by the Court in Bounds.

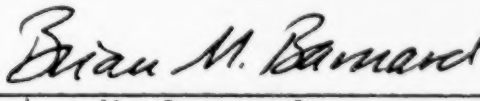
CONCLUSION

In Bounds, the Court imposed an affirmative duty upon authorities to uphold inmates' right of access to the courts by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. The United States District Court of Appeals for the Tenth Circuit held that this duty was satisfied when respondents merely provided petitioner with access to a telephone, free postage, and access to counsel who was unwilling to help petitioner. Such a ruling is in direct conflict, with Bounds' requirement of meaningful access. Allowing this decision to stand will dilute the requirements set forth by this Court in Bounds and will send a message to jailers that they no longer are required to provide affirmative

assistance in order to insure inmates' rights of access to the courts is upheld.

For the reasons stated herein, petitioner Kevin J. Love requests this Court to grant the Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,



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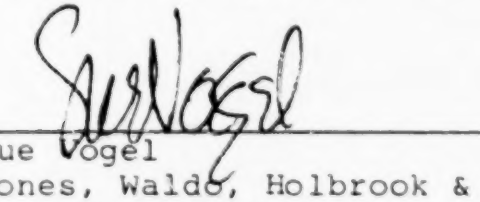

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DATED: April 21, 1986.

Decision of the Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KEVIN J. LOVE. Plaintiff-Appellant, vs. SUMMIT COUNTY, a government entity, RON R. ROBINSON, Sheriff of Summit County, RALPH WILLIAM WALLIN, JR., Summit County Commissioner, GERALD E. YOUNG, Summit County Commissioner, and CARL T. OVARD, Summit County Commissioner, Defendants-Appellees.	)	No. 83-1010

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION
(D.C. No. Civil No. C-82-0546 A)

Brian M. Barnard, Salt Lake City, Utah (Jim Bradshaw, Salt Lake City, Utah, was also on the brief) for Plaintiff-Appellant

Jody K. Burnett, Snow, Christensen & Martineau, Salt Lake City, Utah for Defendants-Appellees

Before HOLLOWAY, Chief Judge, and McWILLIAMS AND LOGAN, Circuit Judges

HOLLOWAY, Chief Judge

Plaintiff-appellant Love brought this action under 42 U.S.C. §§ 1983 seeking declaratory relief, an injunction and damages against the County of Summit, Utah, Ron Robinson, the Summit County Sheriff, and the Summit County Commissioners for alleged violation of his constitutional right of access to the courts. Plaintiff claims defendants violated this right when they refused to grant him access to a law library so that he could research various claims he said he wanted to bring contesting the conditions at the Summit County jail, or alternative assistance.

After a magistrate made a preliminary report and recommendation against dismissal, the district court heard defendants' motion to dismiss plaintiff's

complaint.[1] The court considered matters both parties had submitted outside the pleadings, and granted judgment for defendants. Plaintiff appeals that disposition. We affirm.

I.

Viewing the facts most favorably to the plaintiff, as we must at this juncture, United States v. Diebold, 369 U.S. 64, 65 (1962), defendants incarcerated plaintiff, an indigent, in the Summit County Jail at Coalville, Utah from approximately January 12, 1982 until August 16, 1982 because plaintiff could not post bail while awaiting trial on various criminal charges. I R. 48, 79. The Utah state court appointed an attorney to represent him in the criminal trial

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[1] Plaintiff also filed a motion for summary judgment in this action [I R. 19-28], which the district court denied.

scheduled for March 4, 1982. At a hearing on March 1 plaintiff told the court he no longer wanted the court-appointed attorney to represent him and that he could obtain private counsel. On March 4, a private Salt Lake City criminal attorney appeared for plaintiff. Because of the change in counsel, the state court moved the trial date to June 8. On June 4 the court again continued the trial so that plaintiff's new attorney could obtain a psychological evaluation of the plaintiff and look for witnesses. On August 12 plaintiff pleaded guilty to charges of burglary and theft and on August 16, 1982, the court sentenced him and he was transferred to the Utah State Prison. I R. 56.

Plaintiff had a number of complaints concerning his treatment and the conditions of his confinement while he was incarcerated in the Summit County Jail.

He sought access to a law library orally in late March or early April 1982, and in writing on April 22, 1982 to pursue these claims, but defendants denied his request. Sheriff Robinson told plaintiff that the Summit County Jail does not allow inmates access to a law library because the jail does not have enough staff to supervise inmates while they are in the library and because "what they [the inmates] wanted to do was turn around and sue him and sue Summit County jail and Summit County officers . . . " I R. 77.[2]

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[2] Sheriff Robinson's affidavit stated that he had no recollection of "any specific conversation directly with Love in which he made a request that he be given access to a law library or other legal materials." (Affidavit ¶ 2. I R. 80.) We have considered the statements alleged by plaintiff in the light most favorable to him to determine whether the summary judgment was proper.

The record shows that the Summit County Jail, a small facility[3] does provide some opportunity for inmates to have access to legal representation and the courts, but the jail itself does not have a law library. Although the County has a small law library in the same building and on the same floor as the jail, plaintiff contends the law library is inadequate. Moreover, the library is used by the judges and the County Attorney's staff and the jail has no rules permitting the jail inmates to have access to that or any other law library. However, the jail does allow inmates

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[3] The record shows that the jail has a maximum capacity for 26 inmates. During 1981 and 1982 the jail reached that capacity on only two occasions, for only a few days in each instance. On several occasions in 1981 the jail was empty. During 1981 and 1982 the jail held an average of 8 inmates. I R. 69.

access to attorneys and the courts upon request. The jail makes a telephone available to the inmates and notaries public are available for those who need them.

If an inmate is indigent, the county will appoint counsel for him in criminal matters and will provide free postage, envelopes and stationery so that an indigent may communicate with the courts. The record contains no evidence that Summit County provides free attorneys, paralegals or other persons trained in the law to indigent jail inmates who need help preparing habeas corpus petitions or civil rights claims. Plaintiff and two others who asked for access to a law library at the time of plaintiff's request were the first inmates to request such access while incarcerated at the Summit County Jail. I R. 20, 63-67, 70-72.

Plaintiff had no legal representation for the claims he wanted file, although he did have representation in his criminal action. When plaintiff asked his attorney in the criminal case about filing his civil rights claims, that attorney refused to represent plaintiff but referred him to the attorney who eventually agreed to represent him in the instant case. That civil attorney likewise declined to represent him in his anticipated civil rights litigation over jail conditions, but did provide him prepared forms from the federal court clerk's office for pro se complaints under § 1983. This civil counsel gave plaintiff some "limited instructions" on completion of the forms and encouraged plaintiff to file his civil rights claims on his own concerning the conditions of confinement. III R. 18-19. He also told plaintiff that other

attorneys might be available and willing to take his case on a contingency basis and that he could assist him to find someone; plaintiff did not ask him to do so. III R. 9-10. Sheriff Robinson claims that he did not know plaintiff's representation was limited and that had he known, his office and the jail staff "would have handled the situation differently." I R. 80.

At the hearing before the district court, plaintiff's counsel stated plaintiff had suffered no prejudice when that attorney had declined to represent plaintiff on his civil rights claims; and that plaintiff still had the right to pursue his claims of lack of recreation and medical attention at the jail. III R. 6-7; Appellant's Brief, 19. Nevertheless, plaintiff seeks damages and declaratory relief for harm allegedly resulting from

defendants' failure to allow him access to a law library while he was incarcerated in the jail from January 12 until August 16, 1982.[4]

A hearing and oral argument took place before the magistrate, who entered a Preliminary Report and Recommendation on August 20, 1982. The magistrate found that the court should deny the motion for a preliminary injunction as moot, the plaintiff having been transferred to the Utah State Prison following sentencing. The magistrate found that at the time of the hearing the plaintiff was and since January 12, 1982, had been a pretrial detainee at the Summit County Jail. Plaintiff was given appointed legal

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[4] Plaintiff acknowledges that his transfer to the Utah State Prison rendered his claim for injunctive relief moot. Brief of Appellant, 17.

counsel to represent him in the criminal proceedings against him, and his civil counsel was representing him in the instant civil rights action. During his seven months' incarceration at the jail, the plaintiff had made multiple complaints to jail officials about allegedly unconstitutional conditions of confinement, and he desired to file one or more actions challenging these conditions. Plaintiff had sought use of a law library for that purpose, but his requests were denied. The magistrate found further that the basis of the defendants' motion to dismiss was that plaintiff had counsel representing him in the criminal proceedings and counsel assisting in the civil rights action and therefore had no need for law library facilities. Although plaintiff's civil counsel was assisting plaintiff in the

civil rights action, that attorney had declined to assist him in preparing complaints challenging other allegedly unconstitutional jail conditions.

The magistrate said that the states must provide inmates with an adequate library or other means to assist them in securing access to the courts on constitutional complaints and that the obligation extends to county jail inmates, although not to short-term detainee and recommended that the motion to dismiss be denied. The magistrate did not recommend that the court grant plaintiff's motion for pretrial summary judgment at that time, because the magistrate saw no immediate need to grant the motion and the parties had requested further discovery.

On December 12, 1982, the district judge entered an order denying the plaintiff's motion for summary judgment

and granting the defendants' motion to dismiss the plaintiff's complaint with prejudice, and the court entered judgment in favor of defendants. At the conclusion of the hearing on the motions, the district judge had orally stated that he agreed with the distinction that defendants' counsel had suggested between a pretrial detainee represented by counsel, although for limited purposes, and a prisoner who seeks independently to assert a cause of action and whom the absence of access to a law library prejudices or precludes from bringing a habeas suit or a challenge to conditions of confinement. III R. 17. The judge stated that he did not know of anyone who more easily could have given assistance than plaintiff's counsel in the instant case, who was gifted in that area and could have seen that plaintiff received

the help he needed without concern about the library facilities. The court orally and in its written order granted the motion to dismiss. II R. 22; I R. 83-84.

II.

A.

This circuit has long recognized that, like all persons, "inmates have a constitutional right to 'adequate, effective, and meaningful' access to the courts and that the states have 'affirmative obligations' to assure all inmates such access." Ramos v. Lamm, 639 F.2d 559, 583 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S. Ct. 1759, 68 L. Ed. 2d 239 (1981), quoting Bounds v. Smith, 430 U.S. 817, 822 (1977). Thus far, our cases applying this principle have only dealt with convicted inmates in state prisons, see, e.g., Nordgren v. Milliken, 762 F.2d 851 (10th Cir. 1985);

Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S. Ct. 1759, 68 L. Ed. 2d 239 (1981); Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980); Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978); United States v. Evans, 542 F.2d 805 (10th Cir. 1976), cert. denied, 429 U.S. 1101, 97 S. Ct. 1124, 51 L. Ed. 2d 550 (1977), and detainees in state mental institutions. See, Ward v. Kort, 762 F.2d 856 (10th Cir. 1985).[5]

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[5] At least one circuit has applied the Bounds standards to local jails. See Williams v. Keeke, 584 F.2d 1336, 1340 (4th Cir. 1978), cert. denied, 442 U.S. 911, accord Wolff v. Levi, 573 F.2d 118, 133 (2d Cir.), aff'd in part, rev'd in part on other grounds, sub nom. Bell v. Wolfish, 441 U.S. 520 (1978) ("[O]ne of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense") (affirming district court order requiring greater access to counsel and access to law libraries).

However, other courts recognize that the differences between convicted inmates

This plaintiff, a pretrial detainee, also has a constitutional right to adequate, effective and meaningful

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Footnote 5 continued.

in state long-term detention facilities and pretrial detainees in county jail may call for flexibility in the second case. Campbell v. McGrudger, 580 F.2d 521, 555 n.3 (D.C. Cir. 1978) ("While there are substantial differences between the legal status of prisoners in a jail and those in a correctional institution that might lead to less of a demand for law libraries in jails, the demand for law libraries by pretrial detainees being based on their right of 'access to the courts' is answered insofar as the D.C. Jail is concerned by the availability in all cases by adequate assistance from persons trained in the law"); Harris v. Young, 718 F.2d 620, 623 (4th Cir. 1983) ("There are significant differences between state and local facilities, including the average length of stay and the type of crime for which inmates are incarcerated which, taken together, reasonably support the argument that local jails, operating under limited budgets, were not required to meet the same obligations to inmates as the state facilities"); Jones v. Diamond, 594 F.2d 997, 1024 (5th Cir. 1979), rev'd in part on other grounds on rehearing, 636 F.2d 1364 (5th Cir.) (en banc) cert. dismissed sub nom. Ledbetter v. Jones, 453 U.S. 950 (ordering that convicted

access to the courts to vindicate his fundamental constitutional rights. See, Matzker v. Herr, 748 F.2d 1142, 1150 (7th

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Footnote 5 continued.

prisoners be given access to law libraries but holding that no such relief was necessary for pretrial detainees because "pretrial detainees were not unconstitutionally prevented from seeking redress of their grievances in court, and they all have, if they wish it, appointed or retained counsel"); United States v. Garza, 664 F.2d 135, 142 (7th Cir. 1981) cert. denied, 455 U.S. 993 (1982) ("whatever research handicaps the Marion [federal penitentiary] library imposed [on inmates who had appointed counsel available but proceeded pro se in civil rights claims] could easily have been overcome by simply directing appointed counsel to obtain the needed materials from a more complete law library"); Johnson by Johnson v. Breije, 701 F.2d 1201, 1208 (7th Cir. 1983) (person unfit to stand trial is not entitled to a law library where they "are entitled to be represented by attorneys, and . . . adequate assistance of counsel will be available").

Some circuits have yet to conform the issue. See, e.g., Penland v. Warren County Jail, 759 F.2d 524, 531 (6th Cir. 1985) (holding that whether convicted felons incarcerated in county jails are

Cir. 1984); United States ex rel. George v. Lane, 718 F.2d 226, 230 (7th Cir. 1983). In this case, we need not decide the extent of the affirmative obligations resting on local jail officials to assure inmates access to the courts. Here, the claim for injunctive relief being moot, we must determine only whether plaintiff was entitled to damages or declaratory relief for injury to him in violation of his right of access to the courts. We hold that he was not.

Footnote 5 continued.

entitled to same rights under Bounds as convicted felons in state prison "is a substantial and important question of law that has not been directly addressed by this court"); United States v. Blue Thunder, 604 F.2d 550, 556-57 (8th Cir.) cert. denied, 444 U.S. 902 (1979) ("We need not determine to what extent the rights recognized in Bounds apply to persons temporarily incarcerated while awaiting sentencing . . . ").

B.

The Supreme Court has long recognized that states may not unreasonably infringe on or burden a prisoner's right of access to the courts to vindicate fundamental constitutional rights. Thus, in Ex Parte Hull, 312 U.S. 546, reh. denied, 312 U.S. 716 (1941), the court stated that "the state and its officers may not abridge or impair [a prisoner's] right to apply to a federal court for a writ of habeas corpus . . . " Id. at 549. In Hull, the Court invalidated a prison rule requiring that prisoners submit their habeas petitions to parole board authorities for screening.

Subsequent cases have developed the corollary principle that the states may not deprive prisoners of access to the courts by denying them access to available sources of legal expertise where no adequate alternative sources exist to

assist them in preparing their claims for violation of fundamental constitutional rights. Thus in Johnson v. Avery, 393 U.S. 482 (1969), the Court invalidated a prison rule which prohibited prisoners from assisting one-another in preparing habeas corpus petitions for filing. Pointing out that the states "could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions," the Court concluded that a ban on prisoners assisting one-another, "in the absence of any other source of assistance for such prisoners, effectively does just that." Id. at 487.

In Procunier v. Martinez, 416 U.S. 396 (1974), the Court invalidated a prison regulation which prohibited the use of law students or paralegals to interview prison inmates, stating:

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. Id. at 419.

In Martinez, the prison's prohibition on use of paralegals and law students to interview prison clients unjustifiably increased the cost of legal representation to inmates. In the absence of any justifcation for the rule or any alternative sources of legal assistance, the Court upheld the district court's determination that the rule impermissibly

burdened prisoners' right of access to the courts. Id. at 420-22.

In Wolff v. McDonnell, 418 U.S. 539 (1974), the Court extended the specific holding in Avery to apply to claims under the Civil Rights Act of 1871, pointing out that "[t]he right of access to the courts, upon which Avery was premised, . . . assumes that no person will be denied the opportunity to present to the judiciary obligations concerning violations of fundamental constitutional rights." Id. at 579. In Wolff, petitioners challenged a prison regulation which required prisoners to seek legal assistance from a prison-appointed inmate advisor, claiming it deprived them of the right to seek assistance from others in filing claims. Since it could not assess the quality of legal service the prison-appointed advisor provided, the

Court remanded the case to the district court for assessment of "the adequacy of legal assistance under the reasonable-alternative standard of Avery." Id. at 580.

The Supreme Court did not impose any affirmative obligations on the states to provide prisoners with access to law libraries or legal assistance until it decided Younger v. Gillmore, 404 U.S. 15 (1971). There the Court summarily affirmed the district court's determination that the State of California had to give indigent prisoners "adequate means of obtaining the legal expertise necessary to obtain judicial consideration of alleged grievances cognizable by the courts." Gillmore v. Lynch, 319 F. Supp. 105, 112 (N.D. Cal. 1970).

In Bounds v. Smith, 430 U.S. 817 (1977), the Court expounded on the

obligation recognized in Younger and held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Id. at 828 (footnote omitted). The Court stated that the fundamental question was "whether law libraries or other forms of legal access are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Id. at 825 (emphasis added).

C.

The primary thrust of plaintiff's arguments is that he was entitled to access to a law library while confined in the county jail, although he also argues

he was without alternate access to legal counsel to assert his claims. Brief of Appellant, 7, 9, 24-25. Bounds itself rejects the concept that availability of a law library is an essential component of access to the courts:

> [W]hile adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here . . . does not foreclose alternative means to achieve that goal . . . . Among the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full time staff attorneys, working either in new prison legal assistance organizations or as part of the public defender or legal services offices." Id. at 830-31.

See also Ward v. Kort, supra, 762 F.2d at 860; Nordgren v. Milliken, 762 F.2d 851, 854-55 (10th Cir. 1985), cert. pending. Indeed, a state might reasonably conclude that providing access to a law library is not the best means to assure prisoners access to the courts because it may force illiterate and uneducated prisoners to rely on prison petition writers and other forms of inmate assistance with all of the associated "dangers inherent in prisoners being able through these functions to exercise unreasonable control on their fellows . . ." Battle v. Anderson, 614 F.2d 251, 259 (10th Cir. 1980) (McKay, J., Concurring). In addition, the state, not the inmate, has the right to choose among constitutionally adequate alternatives. Ward v. Kort, supra, 762 F.2d at 860.

Furthermore, in assessing the adequacy of alternatives to law library

assess, we must keep in mind that the "right of access to the courts" merely requires prison authorities "to assist inmates in the preparation and filing of meaningful legal papers" and that the Supreme Court's "main concern" is 'protecting the ability of an inmate to prepare a petition or complaint'." Bounds, supra, 430 U.S. at 828 & 828 n.17, quoting Wolff, supra, 418 U.S. at 576. The supreme Court has never extended "the Fourteenth Amendment due process claim based on access to the courts . . . to apply further than protecting the ability of an inmate to prepare a petition or complaint." Wolff, supra, 418 U.S. at 576. In Nordgren v. Milliken, supra, where the state did not choose to have an adequate law library available to inmates, we declined to hold that the right of access to the courts required more than

the assistance of counsel through completion of the complaint for a federal habeas or civil rights suit. 762 F.2d at 855.

The question here is whether plaintiff actually had access to such assistance, without interference by the defendants, so that his right of access to the courts was not infringed.

D.

Under these standards, we must determine whether plaintiff here was entitled to damages or declaratory relief for infringement of his right of access to the courts. Since plaintiff was incarcerated in the Summit County Jail for 7 months and the magistrate found him to be a long term detainee, I R. 57, this manifestly is not a case in which "brevity of confinement does not permit sufficient time for prisoners to petition the

courts." Cruz v. Hauck, 515 F.2d 322, 333 (5th Cir. 1975), cert. denied, sub nom. Andrade v. Hauck, 424 U.S. 917, 96 S. Ct. 1118, 47 L. Ed. 2d 322 (1976). Moreover, although plaintiff's allegations are conclusory and the factual showing was weak, we will assume that the claims plaintiff wanted to assert were not insubstantial.

We conclude, however, that the plaintiff did not demonstrate a violation of his fundamental constitutional rights. He did not show that he was denied access to adequate legal assistance to help him prepare and pursue his claims before the courts or that defendants in any significant way restricted that access. Plaintiff had access to counsel to pursue his civil rights claims at all times during his incarceration at the Summit County Jail. When he first talked to his

attorney in the criminal case about his potential civil rights claims, that attorney referred him to his attorney who is representing him in this action. This civil counsel declined to represent him in his civil rights claims but did provide him with the forms necessary to pursue his claims in propria persona and gave him limited instructions and encouragement on their use. See Nordgren v. Milliken, supra, 762 F.2d at 854. Plaintiff's civil counsel also told him other attorneys might be available and willing to take his case on a contingency basis and that he could assist him to find someone; plaintiff did not ask him to do so. III R. 9-10.[6]

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[6] We do not consider it important for our purposes that plaintiff's civil counsel, in the instant case, as noted by the district judge, was well qualified to represent plaintiff in asserting the

There is no evidence that the defendants in any way impeded plaintiff's contact with the courts, his access to his criminal attorney or to his civil counsel, or that they would have impeded his access to any additional legal assistance his civil counsel might have obtained. Defendants did deny plaintiff access to the law library. However, plaintiff actually had access to alternative sources of legal assistance, as noted. The record shows that prisoners in the Summit County jail had access to the phone and that indigents had free postage for communications with the courts or their

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Footnote 6 continued.

claims plaintiff wanted to pursue regarding conditions of his confinement. We also do not agree with the district court that it is significant that this civil counsel declined to represent plaintiff in asserting claims regarding the conditions of his confinement.

attorneys. In sum, we do not find in this record evidence of the kinds of actions the Supreme Court has recognized to be deprivations of an inmate's fundamental constitutional right of access to the courts. Despite the complaints made, the defendants' actions did not result in injury entitling plaintiff to damages or declaratory relief.

AFFIRMED.

NOVEMBER TERM - January 22, 1986

Before Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore and Honorable Stephen H. Anderson, Circuit Judges.

KEVIN J. LOVE,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 83-1010
vs.	)	
	)	
SUMMIT COUNTY, etc., et al.,	)	
	)	
Defendants-Appellees.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case

was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, CLERK

By /s/
Robert L. Hoecker
Chief Deputy Clerk

MAILING CERTIFICATE

I hereby certify that on the 22nd day of April, 1986 I caused to be mailed, postage pre-paid, three copies of the above Petition for Writ of Certiorari to Jody Burnett, Snow, Christensen & Martineau, 10 Exchange Place, 11th Floor, Salt Lake City, Utah 84110, Counsel for the Respondents.

Brian M. Barnard

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Utah Legal Clinic
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Salt Lake City, Utah 84111

Counsel for Petitioner

(2)

Case No. 85-1737

Supreme Court, U.S.
FILED
JUL 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

1986 TERM

KEVIN J. LOVE,
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SUMMIT COUNTY, a government entity,
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RALPH WILLIAM WALLIN, JR.,
Summit County Commissioner,
GERALD E. YOUNG,
Summit County Commissioner, and
CARL T. OVARD,
Summit County Commissioner,
RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18 pgs

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QUESTION PRESENTED

Does a pre-trial detainee who is represented by counsel in connection with pending criminal charges and by a second civil rights attorney who provides the detainee with prepared pro se civil rights complaint forms and verbal instructions have an independent right of access to a law library as a means to secure access to the courts?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
DECISIONS BELOW	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	5
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
Bounds v. Smith, 430 U.S. 817 (1977)	6, 7, 8, 9
Ex Parte Hull, 312 U.S. 546, reh. denied, 312 U.S. 716 (1941)	6
Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970)	12
Johnson v. Avery, 393 U.S. 483 (1969)	6
Love v. Summit County, et al., 776 F.2d 908 (10th Cir. 1985).	2
Morrow v. Harwell, 768 F.2d 619 (5th Cir. 1985) .	9
Procunier v. Martinez, 416 U.S. 396 (1974)	6, 9
Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978).	8
Williams v. Leeke, 584 F.2d 1336 (4th Cir. 1978) .	8, 9
Wolff v. McDonnell, 418 U.S. 539 (1974)	6, 7, 12
Younger v. Gilmore, 404 U.S. 15 (1971)	12

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DECISIONS BELOW

Petitioner Love brought this 42 U.S.C. § 1983 action in Utah's Federal District Court, Central Division, alleging a violation of his constitutional right of access to the courts.

The District Court, in an unreported decision, granted Respondents' Motion to Dismiss Petitioner's Complaint for failure to state a claim. The Tenth Circuit Court of Appeals held that Petitioner was not deprived of his constitutional right of access in Love v. Summit County, et al., 776 F.2d 908 (10th Cir. 1985).

STATEMENT OF THE CASE

The Summit County Jail is a small facility having a maximum capacity of 26 inmates. During 1981 and 1982, however, it held an average of only eight inmates. I R. 69. The jail does not have a law library. The County has a small law library on the same floor as the jail, but has no rules permitting jail inmates library access. The jail does allow inmates access to telephones, directories, notaries public, and where

the inmate is indigent, the County will appoint counsel for criminal defense matters, and provide free envelopes, stationery and postage to enable the indigent to communicate with the courts.

In January 1982, Petitioner was charged with criminal behavior and incarcerated in the Summit County Jail. I R. 48. An attorney was appointed to represent him. On March 1, 1982, Petitioner no longer required a court appointed attorney and, on March 4, 1982, retained a private attorney. On August 12, 1984, plaintiff pleaded guilty to charges of burglary and theft and was thereafter transferred to the Utah State Prison. I R. 56.

While incarcerated at the Summit County Jail, Petitioner complained that the conditions of his confinement violated the Constitution. His request to use the County Library was denied.

Petitioner asked his criminal attorney to represent him in a civil rights claim against the County. The criminal attorney refused but referred the Petitioner to a civil rights attorney, Brian Barnard, Petitioner's counsel in the instant case. Barnard declined to challenge Summit County's jail conditions, but gave assistance to the Petitioner in order to challenge the conditions of the jail pro se. Barnard provided Petitioner with prepared pro se civil rights forms obtained from the Federal Court Clerk's office, and provided Petitioner with instructions concerning the completion of the forms. Barnard also informed Petitioner that other attorneys might be willing to represent Petitioner in a civil rights action against Summit County and that Barnard would be willing to assist Petitioner in locating such an attorney. Petitioner did not ask

Barnard for assistance in locating another attorney and did not file pro se pleadings challenging the conditions of the Jail.

SUMMARY OF ARGUMENT

An inmate's constitutional right of access to the courts is realized where the inmate is afforded the opportunity to file meaningful legal papers with a court and where his ability to prepare the petition or complaint is protected. Access to law libraries is not mandated by the Constitution. Petitioner was accorded meaningful access to the courts through his consultations with his civil rights attorney.

ARGUMENT

It is well established that "prisoners have a constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 821 (1977). The Supreme

Court recognized that right in Ex Parte Hull, 312 U.S. 546 (1941), when it struck down a prison regulation prohibiting state prisoners from filing habeas corpus petitions until they were screened by a parole board. Similar prison regulations were invalidated in Johnson v. Avery, 393 U.S. 483 (1969) (prison rule prohibiting prisoners from assisting one another in preparing habeas corpus petitions was unconstitutional); and Procunier v. Martinez, 416 U.S. 396 (1974) (prison rule prohibiting prisoners' use of paralegals and law students was unconstitutional). In Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court specifically extended right of access concepts to the Civil Rights Act of 1871. Today, access rights place upon the state affirmative obligations to insure meaningful access to the courts:

> Our decisions have constantly required states to shoulder affirmative obligations to assure all prisoners meaningful access to the courts. It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them.

Bounds v. Smith, 430 U.S. at 824-25.

Reduced to its essential elements, right of access to the courts requires that inmates be afforded a legitimate opportunity to file "meaningful legal papers," Bounds v. Smith, 430 U.S. at 828, with the judiciary concerning "violations of fundamental constitutional rights." Wolff v. McDonnell, 418 U.S. 539, 579 (1974). The constitutional inquiry is whether "the ability of an inmate to prepare a petition or complaint" has been protected. Bounds v. Smith, 430 U.S. at 828, fn. 17. Where prisoners are given a "reasonably

adequate opportunity to present claimed violations of fundamental constitutional rights to the courts", the state regulation or prohibition passes constitutional muster. Id. at 825.

The due process right of access does not mandate right of entry into a law library. The prison library is "but one factor in the totality of all factors bearing on the inmate's access to the courts which should be considered." Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978). The Supreme Court has "made it clear that prisoners have no absolute right to any particular type of legal assistance." Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978). Thus, while "adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here . . . does not foreclose alternative means to achieve that

goal." Bounds v. Smith, 430 U.S. at 830-31. The Constitution simply does not require "that every small jail must have a law library . . ." Williams v. Leeke, 584 F.2d at 1340.

Fundamental access rights are fulfilled where inmates have a "reasonable opportunity to seek and receive the assistance of attorneys," Procunier v. Martinez, 416 U.S. 396, 419 (1974), whether the attorney is hired by the state as a "part-time consultant," Bounds v. Smith, 430 U.S. at 831, or retained by the inmate personally. Indeed, inmate access to "some sort of direct legal assistance," Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985), is usually "much more effective," Williams v. Leeke, 584 F.2d at 1340, than access to a law library.

Petitioner enjoyed "direct legal assistance" to help him prepare and

pursue his claims before the courts and had "reasonable opportunity to seek and receive the assistance of an attorney." Petitioner discussed his claims with his criminal defense attorney and with his civil rights attorney. The civil rights attorney decided against challenging Summit County's jail conditions but assisted the Petitioner by providing him with the necessary pre-printed pro se civil rights complaints, providing instruction on how to prepare the complaints, and offering to aid petitioner in locating another civil rights attorney. Petitioner declined the opportunity to find a substitute counsel, and did not file a pro se complaint, but nevertheless had an "adequate opportunity" to present his claims.

Respondents did not impede Petitioner's protected right to prepare a

complaint against them. Petitioner was allowed the necessary freedom to communicate with his civil rights attorney and to obtain the prepared pro se complaint forms and instructions. Likewise, respondents did not block or prevent any attempt by Petitioner to communicate with the courts. The record is void of any reference to Petitioner's inability to file petitions, correspond with counsel or the court, receive the assistance of fellow inmates, have access to the means for communicating his concerns through the provision of pen, stationery, envelopes, stamps, and notarial services. Respondent did not prevent Petitioner from filing any pleadings with the court and pleadings were not returned to Petitioner by the court for failure to comply with appropriate format or procedural rules. While the Petitioner nevertheless argues

that his right to reasonable access to the court was denied it seems clear that "the simple invocation of [this phrase] will not carry the day for [the] plaintiff. . . ." Gilmore v. Lynch, 319 F. Supp. 105, 109 (1970), aff'd sub nom., Younger v. Gilmore, 404 U.S. 15 (1971). Petitioner consulted with an attorney, obtained proper forms and instructions and was "not denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." Wolff v. McDonnell, 418 U.S. 539, 579 (1974). Hence, Petitioner's right of access claim is moot. Petitioner had the unrestrained opportunity to pursue any potential cause of action against Summit County. He chose not to bring any action and concedes that any potential claims against the County were not prejudiced by his failure to initiate

suit during the seven months he was incarcerated.

Petitioner was accorded "meaningful access" to the courts. Where that measure is satisfied, the constitutional inquiry ends.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 10th day of July, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By Paul C Droz
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SCM3786C